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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
VOYAGER DIGITAL HOLDINGS, INC., *et al.*,	)	Case No. 22-10943 (MEW)
Debtors.[1]	)	(Jointly Administered)

THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS' OMNIBUS OBJECTION TO MOTIONS SEEKING CONVERSION OR APPOINTMENT OF A CHAPTER 11 TRUSTEE

The Official Committee of Unsecured Creditors (the "Committee") appointed in the above-captioned chapter 11 cases (the "Chapter 11 Cases") of Voyager Digital Holdings, Inc., *et al.* (collectively, the "Debtors") hereby files this omnibus objection (the "Objection") to the: (i)

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Voyager Digital Holdings, Inc. (7687); Voyager Digital Ltd. (7224); and Voyager Digital, LLC (8013). The location of the Voyager Digital Holdings, Inc.'s and Voyager Digital Ltd.'s principal place of business is 33 Irving Place, Suite 3060, New York, NY 10003. Voyager Digital, LLC's principal place of business is 701 S. Miami Ave, 8th Floor, Miami, FL 33131.

Motion for Appointment of a Chapter 11 Trustee [Docket No. 941] (the "Trustee Motion")[2] filed by Michelle DiVita; and (ii) *Letter dated January 9, 2023* [Docket No. 843] (the "Conversion Motion" and, together with the Trustee Motion, the "Motions") filed by Tracy Hendershott (Ms. DiVita and Mr. Hendershott collectively referred to herein as the "Movants"). In support of the Objection, the Committee respectfully states as follows:

PRELIMINARY STATEMENT

1. The Motions should be denied because all of the concerns raised therein (i) are either resolved through the confirmation of the Debtors' chapter 11 plan, which is being considered on the same day as the Motions, or (ii) fall short of justifying appointment of a chapter 11 trustee or conversion of these Chapter 11 Cases.

2. ***First***, the Movants seek appointment of an independent party to investigate and pursue causes of action, including avoidance actions, as well as take managerial control over the Debtors. If the Debtors' chapter 11 plan is confirmed, then an independent party, the Plan Administrator, who was selected by the Committee in consultation with the Debtors, will be appointed to perform such duties.

3. ***Second***, given the current trajectory of these Chapter 11 Cases, the costs and expenses of a trustee would be disproportionately higher than any perceived protection afforded. If a chapter 11 trustee is appointed, the trustee will necessarily need to retain additional professionals and become intimately familiar with the Debtors' business, operations, and ongoing crypto rebalancing and sale process. As a result, there will almost certainly be risk of delay and expense in closing the pending sale and making distributions to creditors. On the other hand, if no

[2] Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Trustee Motion.

delay occurs, then by the time the trustee becomes familiar with the business, the plan may be going effective, at which time the Plan Administrator would take control of the Debtors' affairs.

4. ***Third***, the Movants' allegations of past misconduct by the Debtors do not rise to the level of "cause" sufficient to upend the Chapter 11 Cases through appointment of a trustee or conversion. Importantly, there are no allegations of fraud, gross mismanagement, or incompetence currently in these cases that satisfies the heavy burden of appointment of a trustee or conversion.

5. To establish such burden, the Movants must demonstrate "cause" or that appointment of a trustee or conversion are in the best interests of creditors. For the foregoing reasons, and the reasons set forth below, the Movants cannot establish either basis, and the Motions should be denied.

OBJECTION

I. The Movants Cannot Meet Their Burden to Support Appointment of a Chapter 11 Trustee

6. Bankruptcy Code section 1104(a) provides, in relevant part, that upon request of a party-in-interest, and after a notice and a hearing, the court shall order appointment of a trustee:

> 1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or
>
> 2) if such appointment is in the interest of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.

11 U.S.C. § 1104(a). The Trustee Motion neither establishes cause for the appointment of a trustee nor demonstrates that appointment of a trustee is in the best interests of the estates or stakeholders.

7. The appointment of a chapter 11 trustee is an extraordinary remedy,[3] and the standard for such appointment is heightened. In the Second Circuit, the party seeking the appointment of a chapter 11 trustee bears the burden of proof to establish by clear and convincing evidence that "cause" exists under section 1104(a)(1) or that there is a need for a trustee under section 1104(a)(2). *Adams v. Marwil (In re Bayou Grp., LLC)*, 564 F.3d 541, 546 (2d Cir. 2009). Clear and convincing evidence is a more exacting standard, which establishes in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established. *In re Gans*, 75 B.R. 474, 482 (Bankr. S.D.N.Y. 1987) (internal citations omitted).

8. Moreover, there is an elevated presumption that facilitates a debtor-in-possession having a fair opportunity to reorganize. *See Schuster v. Dragone*, 266 B.R. 268, 271 (Bankr. D. Conn. 2001) (internal citations omitted) ("the Bankruptcy Code favors allowing the debtor to remain in possession and operate the business."); *see In re Anchorage Boat Sales, Inc.*, 4 B.R. 635, 645 (Bankr. E.D.N.Y. 1980) ("Since one would expect to find some degree of incompetence or mismanagement in most businesses which have been forced to seek the protections of chapter 11, the Court must find something more aggravated than simple mismanagement in order to appoint a trustee."). Appointing a trustee is the "last resort" and is reserved only for dire situations. *See W.R.*

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[3] *See In re Adelphia Communications Corp*, 336 B.R. 610, 655 (Bankr. S.D.N.Y 2006) aff'd, 342 B.R. 122 (S.D.N.Y. 2006) ("It is settled that appointment of a trustee should be the exception, rather than the rule. . .") (quoting *In re Sharon Steel Corp.*, 872 F.2d 1225 (3d. Cir. 1989)); *In re Euro-Am. Lodging Corp*., 365 B.R. 421, 426 (Bankr. S.D.N.Y. 2007) ("The appointment of a § 1104 trustee is an extraordinary remedy"); *In the Matter of Cajun Electric Power Cooperative, Inc*., 69 F.3d 747, 749 (5th Cir. 1995) ("the appointment of a trustee pursuant to Section 1104(a)(1) is an extraordinary remedy. . ."); *In re Patman Drilling International, Inc.,* Case No. 07-34622-SGJ, 2008 WL 724086 (Bankr. N.D. Tex. March 14, 2008) ("Appointment of a chapter 11 trustee is a draconian remedy. A strong presumption exists that a chapter 11 debtor should be permitted to remain in possession"); *Official Comm. of Asbestos Pers. Injury Claimants v. Sealed Air Corp (In re W.R. Grace)*, 285 B.R. 148, 158 (Bankr. D. Del. 2002) ("appointing a trustee must be considered as a last resort"); see *In re Marvel Entm't Group, Inc*, 140 F.3d 463, 471 (3rd Cir. 1998) ("Thus, the basis for the strong presumption against appointing an outside trustee is that there is often no need for one. . ."); *Official Comm. Of Unsecured Creditors of Cybergenics Corp., ex. rel. Chinery*, 330 F.3d 548, 577 (3rd Cir. 2003) ("Appointing a trustee in a Chapter 11 case is an extraordinary remedy. . ."); 7 LAWRENCE KING, COLLIER ON BANKRUPTCY Sections 1104.02 [1], 1104.02 [3][d][i] (16th ed. 2022).

Grace & Co., 285 B.R. at 158 (Bankr. D. Del. 2002) (recognizing that "appointing a trustee must be considered a last resort").

9. The Movants fail to demonstrate "cause" sufficient to warrant the appointment of a chapter 11 trustee. Moreover, given the posture of the Chapter 11 Cases, the role of the Committee, and the current chapter 11 plan, the circumstances of the Chapter 11 Cases do not support appointment of a trustee.

A. Appointment of a Trustee is Not in the Best Interests of Creditors

10. Bankruptcy Code section 1104(a)(2) authorizes a court to order the appointment of a trustee "if such appointment is in the best interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor. 11 U.S.C. § 1104(a)(2).[4] In determining whether appointment of a chapter 11 trustee is in the interests of stakeholders, courts engage in a cost-benefit analysis. *See, e.g., Ionosphere Clubs*, 113 B.R. at 168 (courts weigh "the benefits derived by the appointment of a trustee, balanced against the cost of the appointment"); *In re Cardinal Indus*., 109 B.R. 755, 766 (Bankr. S.D. Ohio 1990) (comparing "the cost of a trustee to the estate, when compared with the benefit sought to be derived"); *In re Microwave Prods. of Am., Inc*., 102 B.R. 666, 676 (Bankr. W.D. Tenn. 1989) (same); *see also* H.R. Rep. No. 95-595 (1977) ("may order appointment only if the protection afforded by a trustee is needed and the costs and expenses of a trustee would not be disproportionately higher than the value of the protection afforded."). In

[4] Additionally, courts have considered the following four factors in determining whether a chapter 11 trustee should be appointed pursuant to Bankruptcy Code section 1104(a)(2): (i) the trustworthiness of the debtor; (ii) the debtor in possession's past and present performance and prospects of the debtor's rehabilitation; (iii) the confidence—or lack thereof—of the business community and of the creditors in present management, and (iv) the benefits derived by the appointment of a trustee, balanced against the cost of appointment." *Adelphia Commc'ns Corp*., 336 B.R. at 659 (Bankr. S.D.N.Y. 2006) (citing *In re Ionosphere Clubs, Inc*., 113 B.R. 164, 168 (Bankr. S.D.N.Y. 1990)).

evaluating the cost-benefit analysis, courts "look to the practical realities and necessities." *Ionosphere Clubs*, 113 B.R. at 168.

11. The practical reality here is that the Chapter 11 Cases are nearing an end, with plan confirmation imminent. *See In re 1031 Tax Group, LLC*, 374 B.R. 78, 92 (Bankr. S.D.N.Y. 2007) ("A major factor in these cases affecting the Creditors best interests is the issue of time."). If the plan, which has been ovewhelminly accepted by creditors, is confirmed, then a Plan Administrator, who is entirely independent of the Debtors, will be appointed. Appointment of the Plan Administrator is akin to what the Movants are seeking here—an independent third party to investigate and pursue causes of action. *See W.R. Grace & Co.*, 285 B.R. at 151 (rejecting motion to appoint a trustee, holding that a trustee should not be appointed "if the same result can be obtained by other means" recognizing that appointing a trustee "should be the exception, rather than the rule.").

12. Moreover, the Plan Administrator has been selected by the Committee (in consultation with the Debtors). The Committee is comprised of customers (like the Movants). The Committee's ability to select the Plan Administrator to step into the shoes of the Debtors was a critical component of the Committee's negotiations with the Debtors over the plan. Indeed, under the Debtors' original plan of reorganization, the Debtors retained control over the appointment of the board of directors of any post-confirmation entity. *See Joint Plan of Reorganization of Voyager Digital Holdings, Inc. and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 17], Art. IV.F.

13. In any event, the cost of appointing a trustee greatly outweighs any benefit. The appointment of a trustee will unnecessarily delay an exit from chapter 11, and thus delay the closing of the pending sale transaction and distributions to creditors. There would be time involved

in identifying a trustee with the requisite crypto experience necessary to, among other things, continue the Debtors' operations and the ongoing crypto rebalancing that is necessary to consummate the Binance.US transaction. Once appointed, the trustee would need to become familiar with the Debtors' business and the sale transaction, as well as retain professionals, resulting in additional cost. On the other hand, there is no real benefit to the appointment of a trustee given that the trustee will more than likely be replaced by the Plan Administrator shortly after appointment. Accordingly, appointment of a chapter 11 trustee is not in the best interests of creditors or the estates. *See In re North Stay Contracting Corp.*, 128 B.R. 66, 70 (Bankr. S.D.N.Y. 1991) ("The costs of a trustee will only burden this estate with additional administrative expenses and will not be in the best interests of creditors.").

B. No "Cause" Exists to Appoint a Chapter 11 Trustee

14. The appointment of a chapter 11 trustee is authorized upon the showing of "cause"—inclusive of fraud, dishonesty, incompetence, or gross mismanagement of the debtor's affairs by current management. 11 U.S.C. § 1104(a)(1). These enumerated grounds do not constitute an exhaustive list of factors that warrant the appointment of a trustee; some other "[f]actors relevant to the appointment of a trustee under § 1104(a)(1) include: conflicts of interest, inappropriate relations between corporate parents and the subsidiaries; misuse of assets and funds; inadequate record keeping and reporting; various instances of conduct found to establish fraud or dishonesty; and lack of credibility and creditor confidence." *In re Ashley River Consulting, LLC*, No. 14-13406 (MG), 2015 Bankr. LEXIS 1008, at *28-29 (Bankr. S.D.N.Y. Mar. 31, 2015).

15. The Movants cite various prepetition misconduct such as "financial and regulatory misgivings" paired with "multiple allegations of criminal conduct" as necessitating the appointment of a "neutral, independent" trustee "with the facilitation and backing of the U.S. Government." Trustee Mot, ¶ 37. Although the § 1104(a)(1) analysis is not limited to postpetition

acts, the focus of the analysis is to be based on the debtor's current activities. *See In re Sletteland*, 260 B.R. 657, 672 (Bankr. S.D.N.Y. 2001) ("[O]n a motion for the appointment of a trustee, the focus is on the debtor's current activities, not past misconduct"). The various allegations asserted in the Motions do not demonstrate that the Debtors are currently being victimized by fraud, gross mismanagement, or incompetence that justifies the appointment of a trustee. And the Movants have not made any such allegations. Accordingly, the Motions fall short of clear and convincing evidence that "cause" exists.

II. There is No "Cause" to Convert These Cases to Chapter 7

16. The Movants seek conversion to chapter 7 on the eve of plan confirmation, which will render all progress made to date worthless and materially impact creditor recoveries. There is no "cause" to convert these cases.

17. Bankruptcy Code section 1112(b) authorizes a bankruptcy court to convert a chapter 11 case to a case under chapter 7 "for cause." 11 U.S.C. § 1112(b)(1). The Bankruptcy Code provides a non-exhaustive list of "cause," including, among other things, "(A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation" and "(B) gross mismanagement of the estate." 11 U.S.C. § 1112(b)(4)(A)-(B). To establish "cause" these factors must have occurred post-petition, when an "estate" actually exists. *See In re SageCrest II LLC*, No. 08-50754 (AHS), 2010 Bankr. LEXIS 4592, at *11-12 (Bankr. D. Conn. Dec. 22, 2010) (observing that "all of the enumerated causes in [section 1112(b)(4)] are based on *post*-bankruptcy behavior") (emphasis in original); *see In re Creech*, 538 B.R. 245, 248-49 (Bankr. E.D.N.C. 2015) ("The circumstances indicating substantial or continuing loss or diminution must have occurred post-petition; pre-petition events will not establish cause"); *see In re Sunnyland Farms, Inc.*, 517 B.R. 263, 267 (Bankr. D.N.M. 2014) ("The alleged gross mismanagement must occur post-petition").

18. The Movants cite two primary bases for cause. First, that the Debtors, the Committee, and their professionals have known since the summer of 2022 that a reorganization or rehabilitation was not possible. Conversion Mot., p. 2. Second, that creditors are not being served "by continuously extending the Chapter 11 timeline." *Id*. Such bases do not constitute "cause." Indeed, substantial or continuing loss to or dimunition of the estate alone, is not sufficient to justify conversion. *See 1031 Tax Group*, 374 B.R. at 93 (Bankr. S.D.N.Y. 2007) ("The fact there is a continuing loss to the estate, due to the mounting administrative costs and the lack of any new business entering the estate, is insufficient to establish 'cause' within the meaning of § 1112(b)(1)"). Section 1112(b) requires that such loss or dimunition be accompanied by the absence of a reasonable likelihood of rehabilitation. *See* 11 U.S.C. § 1112(b)(4)(a) ("[1] substantial or continuing loss to or diminution of the estate *and* [2] the absence of a reasonable likelihood of rehabilitation."); *see also In re BH S&B Holdings, LLC*, 439 B.R. 342, 347 (Bankr. S.D.N.Y. 2010) ("It is not enough just to show continuing loss to the estate; the moving party must also show the absence of a reasonable likelihood of rehabilitation.").

19. The Movants fail to recognize that the original timeline in these Chapter 11 Cases provided for confirmation of a chapter 11 plan within six months of the Petition Date. Absent the unexpected and shocking demise of AlamedaFTX, that result would have been attainable. Even so, the Debtors and the Committee worked to quickly find an alternative exit from chapter 11, which is on track to occur approximately three months after the AlamedaFTX transaction failed. Accordingly, there is a reasonable likelihood of rehabilitation and the Conversion Motion should be denied.

III. The Committee is Adequately Representing Creditors

20. Mr. Hendershott is among a group of creditors that desires to have a role on the Committee. The Committee, however, is not responsible for appointing members. Pursuant to the Bankruptcy Code, the U.S. Trustee is responsible for appointing a committee of unsecured creditors as the U.S. Trustee deems appropriate. 11 U.S.C. §1102(a)(1). In September 2022, Mr. Hendershott contacted the U.S. Trustee to request that the Committee be expanded such that he could become a member. Such request was denied by the U.S. Trustee's office, as set forth below:

Re: Voyager Digital Holdings, Inc., *et al.*
Case No. 22-10943 (MEW) SDNY

Dear Mr. Hendershott:

I am writing with respect to your request, dated September 12, 2022, that the United States Trustee expand the membership of the Official Committee of Unsecured Creditors (the "Committee") in the above-referenced chapter 11 cases. Upon receipt of your request, we consulted and raised your concerns with counsel to the Committee.

After considering your request, the United States Trustee has decided not to expand the Committee at this time. We encourage you to reach out to the Committee and its counsel to raise your concerns. Thank you.

Very truly yours,

WILLIAM K. HARRINGTON
UNITED STATES TRUSTEE
Region 2

By: /s/ Richard C. Morrissey

21. Mr. Hendershott now seeks to reconstitute the Committee on the eve of plan confirmation disregarding the fact that on the effective date of the plan, the Committee will be dissolved. *See* Docket No. 943, p. 176 ("On the Effective Date, any statutory committee appointed in the Chapter 11 Cases shall dissolve, and the members thereof shall be released and discharged from all rights and duties arising from, or related to, the Chapter 11 Cases."). Even if Mr.

Hendershott's argument that the Committee should be reconstituted has merit, there is no benefit to appointing an entirely new Committee at this juncture in the Chapter 11 Cases.

22. The Conversion Motion also alleges that the Committee does not inform creditors of the Committee's actions. This is simply false. The Committee has held four multi-hour town halls, regularly answers questions via phone and email from creditors who contact Committee counsel, and maintains a Twitter page where updates are provided frequently. Much of these efforts are atypical for a creditors committee, but the Committee has endeavored to take a proactive approach to provide additional information to its constituency. For the most part, those efforts have been well received by the approximately one million creditors in these cases. The Committee is cognizant that creditors want complete transparency. However, the Committee is bound by confidentiality with respect to many of the issues in these Chapter 11 Cases and has endeavored to provide as much information as possible within those constraints. *See Order Clarifying the Requirement to Provide Access to Confidential or Privileged Information and Approving Protocol Regarding Creditor Requests for Information* [Docket No. 399] ("The Committee shall not be required to disseminate to any entity (as defined in Bankruptcy Code section 101(15)): (i) without further order of the Court, Confidential Debtor Information, Confidential Committee Information, or confidential and non-public proprietary information from other parties or (ii) any information subject to attorney-client or some other state, federal, or other jurisdictional law privilege (including attorney-work product), whether such privilege is solely controlled by the Committee or is a joint or common interest privilege with the Debtors or some other party.")

23. The Committee has and will continue to adequately represent creditors in these Chapter 11 Cases, and any request to remove or replace Committee members at this juncture

should be denied, in particular because the U.S. Trustee has already considered and rejected this request.

RESERVATION OF RIGHTS

24. The Committee reserves all rights to supplement or amend this Objection, to raise additional issues with the Motions and make additional arguments at the hearing, and to present evidence at the hearing.

CONCLUSION

WHEREFORE, the Committee respectfully requests that this Court deny the Motions and grant such other and further relief as the Court deems proper.

Dated: New York, New York
February 23, 2023

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Counsel to the Official Committee of Unsecured Creditors

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February 2023, I caused a true and correct copy of the foregoing *The Official Committee of Unsecured Creditors' Omnibus Objection to Motions Seeking Conversion or Appointment of a Chapter 11 Trustee* (the "Omnibus Objection") to be served on the Service List by (i) by electronic notification pursuant to the CM/ECF system for the United States Bankruptcy Court for the Southern District of New York, (ii) e-mail, or (iii) First Class U.S. Mail, as indicated in the attachment hereto. I further certify that I caused the Omnibus Objection to be served on this 23rd day of February 2023 upon the parties listed below by e-mail.

/s/ Darren Azman
Darren Azman

Tracy Hendershott
tokyotracy@gmail.com

Michelle DiVita
E-MAIL ADDRESS REDACTED

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